

# Cyberbullying and California's Response

By ATTICUS N. WEGMAN\*

## I. Development of Cyberbullying Laws

CYBERBULLYING HAS BECOME an emerging issue, forcing its way onto the doorsteps of schools and congressional floors. School administrators and public officials are grappling with difficult questions that must be answered. Should California continue to rely on other, outdated statutes to address cyberbullying? Should California defer to the federal government for criminalization? Should California criminalize cyberbullying and hope the relevant criminal statutes are not constitutionally struck down? Does cyberbullying warrant any reprimanding at all?

With the advancement of technology-based communications—including email, instant messaging, text messaging, chat rooms, conventional websites, and social networking websites—bullying is moving beyond the confines of the classrooms and cafeterias and into the cyber realm.<sup>1</sup> In fact, 43% of teens aged thirteen to seventeen report that they have experienced some sort of cyberbullying in the past year.<sup>2</sup> Moreover, 81% of youth agree that bullying online is easier to get away with than bullying in person.<sup>3</sup>

The term “cyberbullying” has been the subject of many definitions. One organization defines cyberbullying as the “willful and repeated harm inflicted through the use of computers, cell phones, and

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1. Kevin P. Brady & Kathleen Conn, *Bullying Without Borders: The Rise of Cyberbullying in America's Schools*, SCH. BUS. AFF., Oct. 2006, at 8, available at [http://parentssee.wikispaces.com/file/view/ASBO\\_Oct06\\_SBA\\_Article\\_Cyberbullying.pdf](http://parentssee.wikispaces.com/file/view/ASBO_Oct06_SBA_Article_Cyberbullying.pdf).

2. Chris Moessner, *Cyberbullying*, TRENDS AND TUDES (Harris Interactive, Rochester, N.Y.), Apr. 2007.

3. COX COMM'NS, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, SEXING, AND PARENTAL CONTROLS 23 (2009), available at [http://ww2.cox.com/wcm/en/aboutus/datasheet/takecharge/2009-teen-survey.pdf?campcode=takecharge-research-link\\_2009-teen-survey\\_0511](http://ww2.cox.com/wcm/en/aboutus/datasheet/takecharge/2009-teen-survey.pdf?campcode=takecharge-research-link_2009-teen-survey_0511).

other electronic devices.”<sup>4</sup> Another organization defines cyberbullying as the “willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others.”<sup>5</sup> These definitions are a starting point for helping schools, states, and the federal government understand, regulate, and in some cases criminalize cyberbullying-type conduct.

Interestingly, states that have enacted some version of cyberbullying legislation have mainly done so at the school level.<sup>6</sup> In California, voters have enacted various bullying statutes,<sup>7</sup> particularly Assembly Bill 86,<sup>8</sup> which amended sections of the California Education Code regarding pupil safety. One amended section was California Education Code section 32261.<sup>9</sup> Section 32261(d) holds:

It is the intent of the legislature . . . to encourage school districts, county offices of education, [and] law enforcement agencies . . . to develop and implement interagency strategies . . . that will improve school attendance and reduce school crime and violence, including . . . gang violence, hate crimes, bullying, including bullying committed personally or by means of an electronic act . . . .”<sup>10</sup>

Section 32261(d) did not explicitly create any substantive criminal statute; it merely encouraged local authorities to address cyberbullying concerns themselves.

Assembly Bill 86 also amended Education Code section 48900.<sup>11</sup> Prior to section 48900’s amendment, existing law prohibited “the suspension, or recommendation for expulsion, of a pupil from school unless the principal determines that the pupil has committed any of various specified acts, including, but not limited to, hazing.”<sup>12</sup> There

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4. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: What You Need to Know About Online Aggression*, CYBERBULLYING RESEARCH CENTER, [http://www.cyberbullying.us/cyberbullying\\_fact\\_sheet.pdf](http://www.cyberbullying.us/cyberbullying_fact_sheet.pdf) (last visited Mar. 18, 2013) (internal quotations omitted) (emphasis omitted).

5. *Cyberbullying*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12903> (last visited Mar. 3, 2010).

6. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER, [http://www.cyberbullying.us/cyberbullying\\_state\\_laws.php](http://www.cyberbullying.us/cyberbullying_state_laws.php) (last updated Jan. 2012).

7. See, e.g., A.B. 1156, 2011–2012 Reg. Sess. (Cal. 2011) (revising the existing definition of bullying, requiring training in the prevention of bullying, and authorizing a pupil who has been a victim of bullying to transfer to another district); A.B. 9, 2007–2008 Reg. Sess. (Cal. 2011) (same).

8. A.B. 86, 2007–2008 Reg. Sess. (Cal. 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0051-0100/ab\\_86\\_bill\\_20080930\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0051-0100/ab_86_bill_20080930_chaptered.pdf).

9. CAL. EDUC. CODE § 32261 (West Supp. 2011).

10. *Id.*

11. 2008 Cal. Adv. Legis. Serv. 646 (LEXIS).

12. *Id.*

was no mention of bullying or cyberbullying.<sup>13</sup> As amended, section 48900 gives school authorities the power to suspend or recommend any student for expulsion who “engage[s] in an act of bullying,” which includes “any severe or pervasive physical or verbal act or conduct, including communications made . . . by means of an electronic act . . . directed toward one or more pupils.”<sup>14</sup>

As such, California, like other states, has tried to address cyberbullying at the school level. However, questions remain unanswered. For example, how are schools supposed to regulate cyberbullying that occurs off campus?

Colleen Barnett, author of *Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes*, provides some insight to better address these unanswered questions.<sup>15</sup> Barnett notes that there is considerable and persuasive scholarship that maintains schools do not have the authority to curtail student cyberbullying speech made off campus.<sup>16</sup> Barnett concludes that parents have the authority and that parental involvement is the first necessary step.<sup>17</sup> However, Barnett notes that there is still a problem because “[y]oung people are sometimes reluctant to disclose victimization [to their parents] for fear of having their Internet and cellular phone privileges revoked.”<sup>18</sup> To help address this concern, Congress attempted to enact cyberbullying legislation known as the Megan Meier Cyberbullying Prevention Act.<sup>19</sup>

Unlike the federal level, there does not seem to be any action in California to enact or amend existing Penal Code statutes to provide a criminal sanction solely for cyberbullying.<sup>20</sup> One reason for this may be that pupils, unlike adults, are fragile. The fragility of students warrants more coddling and less criminal sanctions than those found in California’s existing stalking, false impersonation, hate crime, and criminal threat statutes. Nancy Willard, Director of what was formerly called the Center for Safe and Responsible Internet Use, observes that

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13. See *id.*

14. CAL. EDUC. CODE § 48900(r); cf. A.B. 746, 2011–2012 Reg. Sess. (Ca. 2011) (amending section 33261 of the California Education Code to include the “posting of messages on a social network Internet Web site” in the definition of an electronic act).

15. See Colleen Barnett, *Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC L. REV. 579 (2009).

16. *Id.* at 587.

17. *Id.* at 588.

18. *Id.* (internal quotations omitted).

19. See *infra* Part IV.

20. See Hinduja & Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, *supra* note 6.

brain research studies reveal teens have immature frontal lobe development and therefore do not have the “hardwiring” necessary to consistently make well-reasoned, appropriate decisions.<sup>21</sup> This may help explain why California addressed cyberbullying at the school level and in the Education Code rather than the Penal Code. Given the unique brain structure of children and adolescents, the traditional rationales for punishment under the penal system might not warrant criminal prosecution.

## II. California’s Cyberbullying-Related Statutes

If adolescent victims of cyberbullying in California are finding some redress through school legislation, what is being done to criminalize such conduct? In California, relevant statutes include sections 653m(a) and (b),<sup>22</sup> 646.9,<sup>23</sup> 422,<sup>24</sup> 653.2,<sup>25</sup> and 528.5 of the Penal Code.<sup>26</sup>

Section 653m(b) makes it a misdemeanor for any person who, with the intent to annoy or harass, makes repeated calls by telephone or other electronic communication device to another person.<sup>27</sup> Because section 653m(b) requires *repeated* conduct, it would not criminalize a single occurrence of harassing or annoying conduct.<sup>28</sup> Moreover, without any published decision, it is difficult to determine the scope of section 653m(b). Section 653m(a) makes it a misdemeanor for anyone to contact another by phone or electronic means using “any obscene language” or “any threat to inflict injury to the person or property of the person . . . or any member of his or her family.”<sup>29</sup> Though there is no repeated contact requirement like section 653m(b), section 653m(a) still requires either a threat or the use of obscene language. A simple Facebook post calling someone “ugly” or a “whore,” which would qualify as cyberbullying conduct, would not suffice.

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21. Nancy Willard, *A Briefing for Educators: Online Social Networking Communities and Youth Risk*, CENTER FOR SAFE AND RESPONSIBLE INTERNET USE, [http://www.techlearning.com/techlearning/events/techforum06/MichelleRussell\\_ABriefingforEducatorsOnlineSociaNetworking.pdf](http://www.techlearning.com/techlearning/events/techforum06/MichelleRussell_ABriefingforEducatorsOnlineSociaNetworking.pdf) (last visited Apr. 2, 2013).

22. CAL. PENAL CODE § 653m(a)–(b) (West 2010) (obscene, threatening, harassing, or annoying telephone calls).

23. *Id.* § 646.9 (stalking).

24. *Id.* § 422 (criminal threats).

25. *Id.* § 653.2 (cyber-harassment).

26. *Id.* § 528.5 (e-personation).

27. *Id.* § 653m(b).

28. See Cal. Penal Code § 653m(b) (West 2010).

29. *Id.* § 653m(a).

Section 646.9 requires a willful, malicious, and repeated following or harassment of another, coupled with a credible threat with an intent to place that person or their family in reasonable fear for their safety.<sup>30</sup> This statute requires that an actual threat of harm be made; malicious teasing or bullying will not suffice.<sup>31</sup>

Section 653.2 makes it a misdemeanor for any person who—with intent to place another person or their immediate family in reasonable fear for their safety by means of an electronic communication device and for the purpose of imminently causing unwanted harassment—electronically distributes, publishes, emails, hyperlinks, or makes available for downloading *personal identifying information*, including, but not limited to, a digital image of another person, or a harassing message about another person, which would likely incite or produce unlawful action.<sup>32</sup> Section 653.2 is too narrow to cover all cyberbullying-type conduct because it requires the dissemination of personal identifying information and is really just a modification of the existing California criminal stalking statute<sup>33</sup> to prohibit “the type of harassment that has become all to[o] commonplace in this digital age, harassment committed using e-mail, cell phone, or some other electronic communication device.”<sup>34</sup> The purpose of section 653.2 is to “simply [close] an electronic loophole in the stalking statute and [give] law enforcement the ability to hold accountable those who would prey on victims using electronic means.”<sup>35</sup>

Section 422 criminalizes threats made to another that are likely to result in death or great bodily injury.<sup>36</sup> Section 422 encompasses conduct directed at one specifically identified person.<sup>37</sup> Moreover, it requires an actual intent to commit a specific type of harm.<sup>38</sup> This statute does not address the situation of cyberbullying in which one person might post disparaging comments about another on the Internet but does not explicitly threaten to harm that person.<sup>39</sup>

Section 528.5 is a relatively new criminal statute and makes it a crime to knowingly and without consent impersonate another

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30. *Id.* § 646.9.

31. *See id.*

32. *Id.* § 653.2.

33. *See id.* § 646.9.

34. Jose Solorio, Bill Analysis, A.B. 919 (Cal. 2007), *available at* [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0901-0950/ab\\_919\\_cfa\\_20070423\\_101211\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0901-0950/ab_919_cfa_20070423_101211_asm_comm.html).

35. *Id.*

36. CAL. PENAL CODE § 422 (West 2010).

37. *Id.*

38. *Id.*

39. *See id.*

through or on the Internet or other electronic means for purposes of harming, intimidating, threatening, or defrauding.<sup>40</sup> Section 528.5 was introduced by California State Senator Joseph Simitian who intended to curb online impersonation by updating the existing false impersonation law to accommodate modern technologies.<sup>41</sup> Though some believe this statute was introduced to criminalize cyberbullying,<sup>42</sup> there is no indication that this was the bill's sole purpose. Rather, legislative analysis focuses on the false impersonation of another and not the direct tormenting or humiliation of another through electronic means.<sup>43</sup>

Section 528.5 appears to criminalize some conduct that could also be classified as cyberbullying that occurs through an impersonation of another as long as the purpose of the impersonation was to harm, intimidate, threaten, or defraud.<sup>44</sup> What section 528.5 does not cover, however, is teasing and joking that one person may post on another's Facebook page that does not involve impersonation.<sup>45</sup>

One commentator criticizes section 528.5's language for being susceptible to constitutional challenges under the overbreadth and the vagueness doctrines for its use of the words "credibly impersonate" and "harm another person."<sup>46</sup> Moreover, the Assembly Committee on Judiciary admits that the existing law of false impersonation certainly does not expressly exclude acts that might be performed through the Internet.<sup>47</sup> As such, the passage of 528.5 fails to directly address cyberbullying, and as Ryan Calo, director of the Consumer Privacy Project at Stanford Law School, notes, "the line between harmful intent and satire [after the passage of section 528.5] remains blurred. It's difficult to point exactly to acts of impersonation that are threatening, intimidating or defrauding."<sup>48</sup>

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40. *Id.* § 528.5.

41. Tom Ammiano, Bill Analysis, S.B. 1411 (Cal. 2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_1401-1450/sb\\_1411\\_cfa\\_20100621\\_101217\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100621_101217_asm_comm.html).

42. Andrea Koskey, *New Year Brings New Law Targeting Cyberbullying*, SF EXAMINER (Dec. 31, 2010), <http://www.sfexaminer.com/local/2010/12/new-year-brings-new-law-targeting-cyberbullying>.

43. Mike Feuer, Bill Analysis, S.B. 1411 (Cal. 2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_1401-1450/sb\\_1411\\_cfa\\_20100628\\_112759\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100628_112759_asm_comm.html).

44. CAL. PENAL CODE § 528.5 (West 2010).

45. *Id.*

46. Katharine Malone, Comment, *Parody or Identity Theft: The High-Wire Act of Digital Doppelgangers in California*, 34 HASTINGS COMM. & ENT. L.J. 275, 310-11 (2012).

47. Feuer, *supra* note 43.

48. Marianne Levine, *New Law Confronts Cyberbullying*, STAN. DAILY (Jan. 6, 2011), <http://www.stanforddaily.com/2011/01/06/new-law-confronts-cyberbullying>.

Though there is no direct cyberbullying legislation on the books, each of the above statutes can be used as starting points to help curb some cyberbullying-type conduct. Unlike at least twelve other states,<sup>49</sup> California does not have any statute that provides a criminal sanction for cyberbullying.<sup>50</sup>

### III. Cyberbullying and Cyberstalking at the Federal Level

The primary difference between cyberstalking and cyberbullying is that cyberstalking takes place over a long period of time,<sup>51</sup> whereas cyberbullying can constitute one isolated incident.<sup>52</sup> Moreover, most cyberstalking statutes require proof of a credible threat of violence, which might not be present in many instances of cyberbullying.<sup>53</sup> At the federal level, we can find laws regarding the criminalization of cyberstalking conduct, but as of the date of this Article, there is currently no federal cyberbullying statute.<sup>54</sup>

In terms of cyberbullying statutes, 18 U.S.C. § 875(c) is a useful starting point. Section 875(c) makes it a federal crime, punishable by up to five years in prison, for anyone that “transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another.”<sup>55</sup> The statute applies to any communication actually transmitted in interstate or foreign commerce, including threats transmitted via telephone, Internet, or beepers.<sup>56</sup> Given this expansive interpretation, section 875(c) appears to cover most cyberbullying activities. However, to trigger punishment under the statute, there must be an actual threat to injure another.<sup>57</sup> Consequently, this statute would not apply to common cyberbullying activity that merely annoys or harasses another over a period of time.<sup>58</sup> Again, malicious teasing will not suffice.

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49. Hinduja & Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, *supra* note 6.

50. *Id.*

51. Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 126 (2007).

52. Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 267 (2008).

53. Goodno, *supra* note 51, at 135–39.

54. *See infra* Part IV.

55. 18 U.S.C. § 875(c) (2006).

56. *See United States v. Alkhabaz*, 104 F.3d 1492, 1494 (6th Cir. 1997).

57. 18 U.S.C. § 875(c).

58. ATT'Y GEN., 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999), *available at* <http://www.clintonlibrary.gov/assets/storage/Re->

Another cyberstalking related statute is 47 U.S.C. § 223. Section 223 makes it a federal crime, punishable by up to two years in prison, to use a telephone or telecommunications device to annoy, abuse, harass, or threaten another.<sup>59</sup> This section requires that the perpetrator conceal his or her name.<sup>60</sup> It covers more conduct than section 875(c) and punishes less severe acts such as annoying and harassing conduct—much like section 653m of the California Penal Code.<sup>61</sup> However, it applies only to direct communication between a perpetrator and a victim and would be inapplicable in a situation where a person posts messages on a “public” bulletin board or in a chat room encouraging others to “harass” or “annoy” another.<sup>62</sup>

In October 1998, President Clinton signed into law 18 U.S.C. § 2425 to protect children from online stalking.<sup>63</sup> Section 2425 makes it a federal crime to use any means of interstate or foreign commerce to knowingly communicate with any person with intent to solicit or entice a child into unlawful sexual activity.<sup>64</sup> This statute appears to be closely related to cyberbullying-type conduct; however, section 2425 does not include harassing phone calls to minors absent a showing of a *sexual* purpose.<sup>65</sup> Moreover, this statute appears to be designed for curbing unlawful sexual conduct, not cyberbullying-type conduct. This is a common issue with criminal law and the advent of social networking sites such as MySpace and Facebook. There are laws that protect people from cyberbullying-type conduct, but only if it also involves *sexual* intent.<sup>66</sup>

Like California, federal legislation currently has no cyberbullying statute, and consequently, there is still a gap between the cyberstalking and harassment related crimes and cyberbullying-type conduct.<sup>67</sup>

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59. 47 U.S.C. § 223 (2006).

60. *Id.* § 223 (a)(1)(C).

61. *See id.* § 223.

62. ALISON M. SMITH, CONG. RESEARCH SERV., RL34651, PROTECTION OF CHILDREN ONLINE: FEDERAL AND STATE LAWS ADDRESSING CYBERSTALKING, CYBERHARASSMENT, AND CYBERBULLYING 8 (2008).

63. 18 U.S.C. § 2425 (2006).

64. *Id.*

65. *See id.*

66. *See id.*; CAL. PENAL CODE §§ 288.2, 288.3 (West 2008).

67. Alison Virginia King, Comment, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 857 (2010).



#### IV. The Megan Meier Cyberbullying Prevention Act

The push for cyberbullying laws at the federal level is largely attributed to the 1999 Columbine High School shootings.<sup>68</sup> The Columbine High School shootings brought to light the most horrific side of school bullying. Media accounts suggest that the perpetrators behind the shootings had been victims of bullying themselves.<sup>69</sup> After the Columbine shootings, many researchers and school administrators began to look more closely at bullying in schools and determined that bullying is a serious problem.<sup>70</sup>

In 2006, the nation saw another horrific incident of bullying occur through the use of the Internet. Unlike the bullying at Columbine High School, this case involved a young girl who took her own life after being tormented through the social networking site, MySpace.<sup>71</sup> Thirteen-year-old Megan Meier developed a relationship through MySpace with another person whom she thought was a sixteen-year-old boy named "Josh Evans."<sup>72</sup> In reality, Josh Evans never existed.<sup>73</sup> Josh Evans was a fake name and profile created by the mother of a student who attended school with Megan Meier.<sup>74</sup> The student's mother, Lori Drew, continued to contact Megan in hopes of gaining Megan's trust and insight into Megan's thoughts about her daughter.<sup>75</sup>

Through the fake profile, Drew began sending hurtful messages to Megan. For example, Drew stated, "I don't know if I can be friends with you anymore because I've heard you're not very nice to your friends";<sup>76</sup> "Megan Meier is a slut"; and "Megan Meier is fat."<sup>77</sup> Drew took the messages even further and wrote, "You are a bad person and

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68. See Brady & Conn, *supra* note 1.

69. Greg Toppo, *Should Bullies Be Treated as Criminals?*, USA TODAY, <http://usatoday30.usatoday.com/news/nation/story/2012-06-12/bullying-crime-schools-suicide/55554112/1> (last updated June 13, 2012).

70. Kathleen Conn, *Bullying in K-12 Public Schools: Searching for Solutions*, COMMONWEALTH EDUCATION POLICY INSTITUTE, Winter 2006, available at <http://www.cepi.vcu.edu/pdf/Policy%20Briefs/Kathleen%20Conn-Bullying%20VCU%20PolicyPaper%202-11-06.pdf>.

71. Kim Zetter, *Dead Teen's Mother Testifies About Daughter's Vulnerability in MySpace Suicide Case—Update*, WIRED (Nov. 20, 2008, 6:09 AM), <http://www.wired.com/threatlevel/2008/11/lori-drew-pla-1/>.

72. *Id.*

73. *Id.*

74. *Parents: Cyber Bullying Led to Teen's Suicide*, ABC NEWS (Nov. 19, 2007), <http://abcnews.go.com/GMA/story?id=3882520&page=1#.UY2KKisa-Kw>.

75. Joshua Seth, *Memorializing Megan Meier (Photos)*, EXAMINER.COM (Dec. 12, 2011), <http://www.examiner.com/article/memorializing-megan-meier>.

76. *Id.* (emphasis omitted).

everybody hates you. Have a sh@#\$ rest of your life. The world would be a better place without you.”<sup>78</sup>

Devastated by these remarks, Megan Meier committed suicide in her bedroom closet on October 16, 2006.<sup>79</sup> Megan’s parents felt unbearable pain; as Megan’s father explained, “That’s the biggest tragedy of the whole thing: An adult did it.”<sup>80</sup> Importantly, Megan’s family knew of Megan’s relationship with “Josh Evans” but was unable to stop it.<sup>81</sup> Megan’s mother even called the police to determine if they could find out if “Josh Evans” was real.<sup>82</sup> They could not.<sup>83</sup> As the local county’s spokesman stated, “what Mrs. Drew did ‘might’ve been rude, it might’ve been immature, but it wasn’t illegal.’”<sup>84</sup>

After the death of Megan Meier, Lori Drew was arraigned in the Central District courthouse in Los Angeles, California.<sup>85</sup> Prosecutors wanted to charge Drew with a crime, but there was no applicable federal statute against cyberbullying.<sup>86</sup> As an alternative, the U.S. Attorney’s Office devised other novel arguments to prosecute Lori Drew, one of which involved Lori Drew’s unauthorized use of MySpace.<sup>87</sup> Prosecutors charged Drew with one count of conspiracy and three counts of violating the Computer Fraud and Abuse Act (“CFAA”), traditionally an anti-hacking statute.<sup>88</sup> Because MySpace servers were based in Los Angeles, personal jurisdiction was proper in California.<sup>89</sup> Prosecutors alleged that Drew violated the MySpace user agreement, which required users to provide factual information about themselves and refrain from soliciting personal information from minors.<sup>90</sup> By acknowledging the contract’s terms with the click of a button and sub-

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77. *Parents: Cyber Bullying Led to Teen’s Suicide*, *supra* note 74 (internal quotations omitted).

78. Seth, *supra* note 75 (internal quotations omitted) (emphasis omitted).

79. *Parents: Cyber Bullying Led to Teen’s Suicide*, *supra* note 74.

80. *Id.* (internal quotations omitted).

81. *Id.*

82. *Id.*

83. *Id.*

84. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23, available at <http://www.nytimes.com/2007/11/28/us/28hoax.html>.

85. *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

86. Kim Zetter, *Cyber Bullying Case Officially Dismissed for Vagueness*, WIRED (Aug. 31, 2009, 1:54 PM), <http://www.wired.com/threatlevel/2009/08/lori-drew-ruling>.

87. *Drew*, 259 F.R.D. at 452.

88. 18 U.S.C. § 1030 (2006).

89. Zetter, *supra* note 86.

90. *Id.*

sequently violating them, Drew committed the same crime as a hacker.<sup>91</sup>

The jury acquitted Drew of all felony charges.<sup>92</sup> However, the jury found her guilty of “accessing a computer involved in interstate or foreign communication without authorization . . . to obtain information”—a misdemeanor.<sup>93</sup> The jury did not find Drew guilty of the tort of intentional infliction of emotional distress, which would have made Drew’s unauthorized use of a computer a felony.<sup>94</sup> In a post-judgment motion, Drew’s counsel, H. Dean Steward, argued that Drew’s violations of the MySpace terms of service (“TOS”) were not sufficient to constitute a misdemeanor and that the statute was unconstitutionally vague.<sup>95</sup>

Presiding Judge George H. Wu agreed with Steward. Judge Wu reasoned that criminal statutes must contain a “fair warning” requirement.<sup>96</sup> This mandates that criminal statutes comport with the vagueness doctrine, which invalidates a statute that either forbids or requires performance of an act in such vague terms that men of common intelligence must guess at its meaning and, as a result, differ as to its application.<sup>97</sup>

Judge Wu was also concerned with the intent requirement of the CFAA. Judge Wu explained that the CFAA did not set forth clear guidelines or objective criteria as to the prohibited conduct on the Internet or other similar contexts.<sup>98</sup> The Government argued that the intent requirement was met by Drew’s conscious decision to violate the MySpace TOS by using the website to harass Meier.<sup>99</sup> Judge Wu responded that if a conscious breach of the TOS is sufficient by itself to satisfy the intent requirement, it would afford too much discretion to the police and too little notice to citizens who wish to use the Internet.<sup>100</sup> Thus, it seemed, the Government was stretching in their attempts to find a sufficient enforcement mechanism to curb cyberbullying.

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91. *Id.*

92. *United States v. Drew*, 259 F.R.D. 449, 451 (2009).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 462 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

97. *Id.* at 463 (citing *United States v. Lanier*, 520 U.S. 259, 266 (1977)).

98. *United States v. Drew*, 259 F.R.D. 449, 464 (C.D. Cal. 2009).

99. *Id.* at 467.

100. *Id.*

In terms of the CFAA's application, Judge Wu noted, "While this case has been characterized as a prosecution based upon purported 'cyberbullying,' there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned such an application of the statute."<sup>101</sup> Thus, once Drew was acquitted of the unauthorized access of a computer to commit a crime or tortious act, the case turned from an issue about cyberbullying to the applicability of the CFAA in punishing violations of a website's TOS.<sup>102</sup>

Steward believed everyone had a skewed version of the story.<sup>103</sup> He commented that the victim's mother worked with a public relations firm that demonized his client and further distorted the public's perception of the case.<sup>104</sup> Steward continued to defend Drew, knowing from the outset of the case that the prosecution's indictment for violating the CFAA would fail on vagueness grounds.<sup>105</sup> Steward likened cyberbullying to one person yelling at another across the street, which alone, is certainly not a crime.<sup>106</sup>

Children cannot be completely prohibited from using the Internet. With the fascination surrounding social networking sites, children and teenagers are forced to use them or risk suffering backlash from others. The use of social networking sites has become the social norm and is not slowing down.<sup>107</sup> Facebook recently surpassed MySpace, which as of 2010 boasted over 206.9 million users.<sup>108</sup> Today, children, teenagers, and adults have the ability to post messages about others or otherwise communicate without having to worry about the possibility of instant physical confrontation.

After the acquittal of Lori Drew, Congress began looking into ways to prosecute individuals for cyberbullying. The result was the Megan Meier Cyberbullying Prevention Act, which was sponsored by Congresswoman Linda Sanchez, a democrat from California.<sup>109</sup> This bill, which was introduced on April 2, 2009, failed to make much progress in Congress and was never brought to a vote in the House or Senate. The bill would have amended the federal criminal code and

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101. *Id.* at 451 n.2.

102. *Id.* at 451.

103. Interview with H. Dean Steward, Counsel for Lori Drew (Apr. 10, 2010).

104. *Id.*

105. *Id.*

106. *Id.*

107. Lance Whitney, *Twitter, Facebook Use Up 82 Percent*, CNET (Feb. 22, 2010), [http://news.cnet.com/8301-1023\\_3-10457480-93.html](http://news.cnet.com/8301-1023_3-10457480-93.html).

108. *Facebook, Twitter Usage Surges*, NEW STATESMAN (Feb. 23, 2010), <http://www.new-statesman.com/digital/2010/02/facebook-hours-social-spent>.

109. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

imposed penalties on violators.<sup>110</sup> The language of the bill sought to punish anyone who “transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.”<sup>111</sup> Unlike statutes found in the California Education Code, a violation of the Megan Meier Cyberbullying Prevention Act would have provided for a felony penalty.<sup>112</sup>

Megan Meier has not been the only victim of cyberbullying. Others have committed suicide due to peer pressure channeled through social networking sites.<sup>113</sup> Enacting laws to protect people from bullying through social networking sites could be the solution. The Megan Meier Cyberbullying Prevention Act would have been the first of its kind to prosecute such conduct. The next question that must be answered is whether laws regulating cyberbullying can withstand constitutional scrutiny.

## V. Constitutional Concerns

The leading authority for student free speech is *Tinker v. Des Moines Independent Community School District*.<sup>114</sup> In *Tinker*, three public school students decided to protest the Vietnam War by wearing black armbands.<sup>115</sup> School officials became aware of the students' plans and adopted a policy whereby school officials would demand that students remove their armbands.<sup>116</sup> Students who refused to obey would be suspended until they returned without the armband.<sup>117</sup> On December 16, 1965, several students, against school policy, wore black armbands and were subsequently suspended.<sup>118</sup> The students then filed a com-

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110. *Id.*

111. *Id.*

112. *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 2 (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-76\\_52547.PDF](http://judiciary.house.gov/hearings/printers/111th/111-76_52547.PDF).

113. See, e.g., John Halligan, *Death by Cyber-Bully*, BOSTON GLOBE, Aug. 17, 2005, at A13, available at [http://www.boston.com/yourlife/health/mental/articles/2005/08/17/death\\_by\\_cyber\\_bully/](http://www.boston.com/yourlife/health/mental/articles/2005/08/17/death_by_cyber_bully/); Brian Stelter, *Web Suicide Viewed Live and Reaction Spur a Debate*, N.Y. TIMES, Nov. 24, 2008, at A16, available at [http://www.nytimes.com/2008/11/25/us/25suicides.html?\\_r=1&scp=1&sq=Web%20Suicide%20Viewed%20Live%20and%20Reaction%20Spur%20a%20Debate&st=cse](http://www.nytimes.com/2008/11/25/us/25suicides.html?_r=1&scp=1&sq=Web%20Suicide%20Viewed%20Live%20and%20Reaction%20Spur%20a%20Debate&st=cse).

114. 393 U.S. 503 (1969).

115. *Id.* at 504.

116. *Id.*

117. *Id.*

118. *Id.*

plaint in federal court seeking an injunction to prevent school officials from issuing suspensions for wearing black armbands and protesting the Vietnam War.<sup>119</sup>

The district court dismissed the students' action, holding that school authorities did not violate the Constitution and acted reasonably to prevent disturbance of school discipline.<sup>120</sup> On appeal, the Eighth Circuit affirmed without opinion.<sup>121</sup> The Supreme Court granted certiorari and framed the issue as one not relating to the "regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"<sup>122</sup> The Supreme Court noted that only five out of 18,000 students in the school system wore these armbands and that the protest did not disrupt the school or classroom.<sup>123</sup> Further, the Court noted that school authorities were not motivated by fear of school disruption, but rather "the principle of the demonstration" itself.<sup>124</sup>

The Supreme Court developed two important rules when it decided that the First Amendment protected the students' speech of wearing the armbands. First, citing an earlier Fifth Circuit case, the Court held that prohibiting expression is not permissible unless it is necessary to avoid material and substantial interference with the school's work or discipline.<sup>125</sup> Second, the Court explained that there was no evidence of students' interference with the school's work or collision with the rights of other students to be secure and let alone.<sup>126</sup> This second test has since been largely overlooked in the progeny of student freedom of speech cases.<sup>127</sup>

In the 2010 case of *J.C. v. Beverly Hills Unified School District*,<sup>128</sup> a federal district court ruled that school officials violated the First Amendment of the U.S. Constitution when they disciplined a student who posted a video on YouTube that maligned a classmate.<sup>129</sup> The student's video was a four minute and thirty-six second monologue

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119. *Id.*

120. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

121. *Id.*

122. *Id.* at 507-08.

123. *Id.* at 508.

124. *Id.* at 509 n.3 (internal quotations omitted).

125. *Id.* at 511 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

126. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

127. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010).

128. *Id.*

129. *Id.* at 1122.

calling another student a “slut” and “spoiled.”<sup>130</sup> The following day, school officials demanded that the student who posted the video delete it from YouTube and her home computer.<sup>131</sup> The school then suspended the student for two days.<sup>132</sup> The student brought a lawsuit alleging that the school violated her First Amendment constitutional rights.<sup>133</sup>

The court applied the *Tinker* test and determined that the YouTube video did not create a risk of substantial disruption to school activities, and as such, school officials violated the student's First Amendment rights.<sup>134</sup> The court reasoned that the video was:

[N]ot violent or threatening. There was no reason for the School to believe that [the subject's] safety was in jeopardy or that any student would try to harm [her] as a result of the video. . . . Instead, [the subject] felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class.<sup>135</sup>

The court in *J.C.* explained that it “cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.”<sup>136</sup> The court's reasoning highlights an interesting perspective regarding the criminalization of cyberbullying conduct. One commentator believes there is a conundrum at issue here, at least in regards to criminalizing cyberbullying conduct:<sup>137</sup>

This conundrum—that one student's constitutionally protected speech can be another student's humiliation—lies at the heart of the debate over how expansive the criminal regulation of bullying should become. With each step toward greater protection of victims, the law risks further encroachment upon the free speech rights of others.<sup>138</sup>

If the cases above did not find that students' conduct created a substantial disruption, what will constitute a substantial disruption? One court has held that a substantial disruption requires something

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130. *Id.* at 1098.

131. *Id.* at 1099.

132. *Id.*

133. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1097 (C.D. Cal. 2010).

134. *Id.* at 1122.

135. *Id.* at 1117.

136. *Id.* at 1122.

137. Tracy Tefertiller, Comment, *Out of the Principal's Office and Into the Courtroom: How Should California Approach Criminal Remedies for School Bullying*, 16 BERKELEY J. CRIM. L. 168, 204 (2011).

138. *Id.*

more than a “mild distraction or curiosity created by the speech,” but it need not rise to the level of “complete chaos.”<sup>139</sup> Though students may discuss the speech at issue, this does not alone cause a substantial disruption.<sup>140</sup> In contrast, substantial disruption exists when a student shows a teacher a poem that explicitly described a mass shooting of his classmates and his own suicide;<sup>141</sup> when a student creates a graphic video-dramatization of his teacher’s death;<sup>142</sup> or even when a student’s article purports to tell everyone how to hack into school computers.<sup>143</sup>

The court in *J.C.* provided additional guidance as to what constitutes a substantial disruption. The court explained that “[f]or the *Tinker* test to have any reasonable limits, the word ‘substantial’ must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure.”<sup>144</sup>

Nancy Willard argues that the judge in *J.C.* failed to address the second prong set forth in *Tinker*.<sup>145</sup> In fact, many cases post-*Tinker* have failed to address *Tinker*’s second prong, which considers whether a student’s speech imposed a substantial interference with the rights of other students.<sup>146</sup> Willard notes that though *J.C.* may appear to suggest that school officials should intervene in cyberbullying situations only if there is a substantial disruption of school activities, school districts can rely on other case law to justify responding to situations where one student is interfering with the security of another student, regardless of the geographic origin of the speech.<sup>147</sup> Willard cites *Saxe v. State College Area School District*<sup>148</sup> for support.<sup>149</sup>

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139. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

140. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

141. *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001).

142. *O.Z. v. Bd. of Trs. of the Long Beach Unified Sch. Dist.*, No. CV 08-5671, 2008 WL 4396895, at \*4 (C.D. Cal. Sept. 9, 2008).

143. *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 828–29 (7th Cir. 1998).

144. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010).

145. *See* Nancy Willard, *There Is No Constitutional Right to Be a Cyberbully: Analysis of J.C. v. Beverly Hills Unified School District*, CENTER FOR SAFE AND RESPONSIBLE INTERNET USE (Dec. 16, 2009), <http://www.embracecivility.org/wp-content/uploadsnew/2011/10/JCcyberbullyingcase.pdf>.

146. *See* Martha McCarthy, *Anti-Harassment Provisions Revisited: No Bright-Line Rule*, 2008 BYU EDUC. & L.J. 225, 240–43 (2008).

147. Willard, *supra* note 145, at 2.

148. 240 F.3d 200 (3d Cir. 2001).

149. Willard, *supra* note 145, at 1.



*Saxe* dealt with a school district's bullying prevention policy.<sup>150</sup> Willard believes that although the court ultimately found the bullying policy to be unconstitutionally overbroad,<sup>151</sup> Judge Alito (now Supreme Court Justice) expressed concerns about the language of the district's policy—banning speech that “creat[es] an intimidating, hostile or offensive environment”—because it did “not, on its face, require any threshold showing of severity or pervasiveness.”<sup>152</sup> Willard interprets the court's reasoning to mean that school officials can regulate student speech that is sufficiently severe or pervasive, though not merely “offensive,” if it substantially interferes with a student's educational performance.<sup>153</sup> It should be noted, however, that *Saxe* admitted the precise scope of the second prong in *Tinker* was unclear,<sup>154</sup> and it pointed to at least one court that opined the second *Tinker* prong only covers independently tortious speech like libel, defamation, slander, or intentional infliction of emotional distress.<sup>155</sup>

Willard also cites *Sypniewski v. Warren Hills Regional Board of Education*.<sup>156</sup> Willard notes that this case, like *Saxe*, involved student speech that caused emotional harm to another student.<sup>157</sup> However, in *Sypniewski*, the issue was not “cyberbullying,” “bullying,” or even “name-calling.” *Sypniewski* dealt with a school district's anti-harassment policy—in particular, racial harassment.<sup>158</sup> The school had a history of racial tension and enacted the policy in response.<sup>159</sup> A student allegedly violated the school's policy when he wore a Jeff Foxworthy t-shirt that displayed “redneck” jokes on the front and back.<sup>160</sup> The school suspended the student under the school's dress code policy but noted the student also violated the harassment policy.<sup>161</sup> In deciding the issue of free speech, the court did not find any “cyberbullying,” “bullying,” or even “name-calling.”<sup>162</sup> Rather, the focus of *Sypniewski* was on

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150. *Saxe*, 240 F.3d at 202.

151. Willard, *supra* note 145, at 4.

152. *Saxe*, 240 F.3d at 202, 217.

153. Willard, *supra* note 145, at 4.

154. *Saxe*, 240 F.3d at 217 (3d Cir. 2002).

155. *Id.* (citing *Slotterbock v. Interboro Sch. Dist.*, 766 F. Supp 280, 289 n.8 (E.D. Pa. 1991)).

156. Willard, *supra* note 145, at 1. *See generally* *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002).

157. Willard, *supra* note 145, at 4.

158. *Sypniewski*, 307 F.3d at 264.

159. *Id.* at 246.

160. *Id.*

161. *Id.* at 250–51.

162. *Id.*

the anti-harassment policy itself.<sup>163</sup> *Sypniewski* found the Jeff Foxworthy t-shirt did not create a substantial disruption to warrant infringing on the student's First Amendment rights.<sup>164</sup> The court also found the school's anti-harassment policy, with the exception of one provision, was acceptable in light of the history of race relations at the school, though the Jeff Foxworthy t-shirt did not violate that policy.<sup>165</sup>

Perhaps the best case to support Willard's position is *Kowalski v. Berkeley County Schools*.<sup>166</sup> *Kowalski* involved the suspension of a student for creating a website on which other students posted defamatory information about a classmate.<sup>167</sup> The court in *Kowalski* found that the school district did not violate the student's free speech rights.<sup>168</sup> In doing so, *Kowalski* might have come the closest of any court to reviving the second prong of the *Tinker* test. The court explained the speech was "materially and substantially disruptive in that it 'interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone.'"<sup>169</sup> The notion that more weight should be given to *Tinker*'s second prong has also been supported by legal scholarship.<sup>170</sup> One argument for the revival of *Tinker*'s second prong is that it will give school officials more power to intervene to protect the safety and emotional well-being of innocent victims from vicious, malicious cyber-attacks on their character and reputation.<sup>171</sup> However, as one commentator notes, *Kowalski* cited *Tinker*'s second prong nine times throughout the opinion but failed to incorporate its specific language in the conclusion of the opinion.<sup>172</sup>

Regardless if courts strengthen the limited authority found in *Kowalski* and other cases for the preservation of *Tinker*'s second prong to protect victims of cyberbullying, there will still be an argument concerning the seriousness of such conduct. Is cyberbullying or bullying severe enough to warrant criminalization and punishment? This question is difficult to answer and may be more apt for a philosophical debate. Case law, on the other hand, need only deal with *stare deci-*

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163. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 269 (3d Cir. 2002).

164. *Id.* at 269.

165. *Id.* at 265–69.

166. 652 F.3d 565 (4th Cir. 2011).

167. *Id.* at 567.

168. *Id.*

169. *Id.* at 573–74 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

170. See Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 203 (2012).

171. *Id.*

172. *Id.* at 202.

sis.<sup>173</sup> Unfortunately, as noted above, there does not seem to be much case law in this area. Still, we are using the *Tinker* test—a case decided over forty years ago. This is likely one reason why courts, legislators, and school administrators are struggling to devise a proper way to deal with the advent of cyberbullying.

## VI. Off-Campus v. On-Campus Cyberbullying

School officials can punish cyberbullying occurring on-campus with much less judicial scrutiny than off-campus cyberbullying. This is because schools control when students are able to use computers, cell phones, pagers, and the like on campus. A school can refuse to lend its resources to student expression with which it disagrees as long as its rationale is “reasonably related to legitimate pedagogical concerns.”<sup>174</sup> Schools also have the ability to set up their own computer or cell phone policies.

Conversely, the majority of courts have found that off-campus Internet speech cannot be subject to the jurisdiction of school disciplinary action.<sup>175</sup> Moreover, schools are not vested with the power to discipline students for conduct that relates solely to off-campus activities that are not school sponsored. To discipline students without running afoul the Constitution, schools must comply with the *Tinker* test. Unfortunately, the *Tinker* test, as highlighted by its progeny, is a high standard for schools to meet.<sup>176</sup>

This is not to say that off-campus cyberbullying speech can never be regulated by schools under the First Amendment. Cyberbullying speech that originates off-campus can be regulated if there is a “sufficient nexus between the web site and the school campus.”<sup>177</sup> This nexus has been established in cases in which either a student accessed a website at school during class or the website content was aimed specifically at the school and later carried on by students on campus.<sup>178</sup> If

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173. See generally BLACK'S LAW DICTIONARY 1537 (9th ed. 2009) (defining *stare decisis* as “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”).

174. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

175. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

176. See Erb, *supra* note 52, at 267–68; Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (holding when a student creates a website at home that disparages and insults his principal and results in “congregating and giggling” by other students during school, it is not a substantial disruption because no classes were cancelled and no widespread disorder occurred).

177. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

178. *Id.*

courts do find a sufficient nexus between the speech and the school campus, they will then examine whether the speech substantially or materially disrupts the learning environment under the *Tinker* test.<sup>179</sup>

Thus, our current system under *Tinker* does allow schools to regulate cyberbullying conduct that occurs both on and off campus. Case law has acknowledged that a special approach must be taken with respect to the First Amendment and the public school setting whereby school administrators must have the authority to “provide and facilitate and to maintain order.”<sup>180</sup>

## VII. Outside the Law

The law in the area of cyberbullying is young and unrefined. As a result, it is important to recognize ways to deal with cyberbullying outside the law.

Assuming there are no criminal statutes regulating such conduct, the most powerful way to effectively combat cyberbullying is through communication.<sup>181</sup> Children must be taught to report cyberbullying; young people need to know that adults will react quickly and responsibly to instances of cyberbullying.<sup>182</sup> Schools can also take the initiative by educating parents and others within the local community about the potential problems associated with cyberbullying.<sup>183</sup> Finally, school officials need to reevaluate their Internet use management policies and strategies to incorporate instances of student-to-student on-line cruelty.<sup>184</sup>

Parents obviously play a large role in curbing the attitudes of our youth. Some parents may even believe our American public school system is more than an educational institution—it is also an institution of reform. However, this is not the right tactic. If we are to hold schools responsible for not only educating but also acting as the primary disciplinary figure in students’ lives, undoubtedly our students’ education will suffer. Schools cannot play the role of police officer in the classroom.<sup>185</sup> In so doing, schools will be forced to use valuable resources for quasi-educational purposes rather than simply focusing

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179. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

180. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 252–53 (3d Cir. 2002).

181. Brady & Conn, *supra* note 1, at 10.

182. *Id.*

183. *Id.*

184. *Id.*

185. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 277 (2001).

on education. Certainly, part of educating may require the teaching of discipline. However, due to the muddled waters of cyberbullying law, schools are not able to discern a bright-line rule regarding when, who, and how they can discipline our students.

### **Conclusion**

Cyberbullying has spread its tentacles into various areas of the law. Courts are trying to understand how best to interpret cyberbullying in congruence with the First Amendment. On the state level, the legislature has begun providing our schools with more authority to discipline students. On the federal level, Congress attempted to pass cyberbullying legislation known as the Megan Meier Cyberbullying Prevention Act. These tactics will prove helpful in increasing awareness of the seriousness of bullying. However, the ongoing debate as to what exactly constitutes bullying and whether bullying is serious and pervasive enough to warrant its criminalization will remain.

Bullying has multiple definitions. Moreover, bullying is measured on a continuum. For instance, on one end you will find teasing and horseplay. On the other end, you will find true threats that rise to the level of criminality. Somewhere in the middle is bullying-type conduct, which is tough to identify and thus criminalize or discipline. The same difficulties increase when the conduct is being transferred by secondary means—such as by the Internet or cell phones—as opposed to face-to-face contact. Mere awareness of bullying and its side effects may be the best cyberbullying deterrent rather than re-evaluating the *Tinker* test, enacting new laws that provide schools with more authority, or limiting Internet usage.

